1978

State of Utah v. Kenneth Eugene Gotfrey : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

vs. : No. 15804

KENNETH EUGENE GOTFREY, :

Defendant-Appellant. :

BRIEF OF APPELLANT

Appeal from the Seventh Judicial District Court in and for Carbon County, State of Utah, the Honorable Boyd Bunnell, presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is a criminal proceeding brought by the State of Utah against Kenneth Eugene Gotfrey charging him with one count of Forcible Sodomy, two counts of Rape, and two counts of Forcible Swxual Abuse in violation of sections 76-5-403, 76-5-402, and 76-5-404 Utah Code Annotated 1953, as amended.

DISPOSITION IN THE LOWER COURT

The defendant was found guilty in the District Court of the Seventh Judicial District in and for Carbon County, State of Utah, on March 21, 1978, after a jury trial, of Forcible Sodomy and two counts of Rape. The Defendant waived time for pronouncement of judgment and the Court on March 21, 1978 sentenced the Defendant to serve a term of 1-15 years on Count I, Forcible Sodomy, and two terms of 5 years to life for Rape on Counts II and III, all sentences to run concurrently.

RELIEF SOUGHT ON APPEAL

Appellant seeks an Order of this Court reversing the judgment and verdict rendered at trial and a ruling remanding the cause to the Trial Court for a new trial.

STATEMENT OF FACTS

At trial Michael Gene Garcia, a sixteen year old step-son of the defendant, testified that he was deer hunting with defendant on October 23, 1976, in Carbon County, Utah. Michael and the defendant and a young cousin of Michael were sleeping in a tent when Michael was awakened by defendant's hand over his mouth. (T. 51). The Defendant then took down Michael's pants, ordered Michael to be quiet, and then placed his mouth over Michael's sexual organ. (T. 51). Michael stated that he did not do this willingly but that the defendant held him so that he couldn't get up. (T. 51). On cross-examination Michael testified that a cousin was in the tent at the time (T. 55, 67, 68) and that an Uncle and four to six friends of the uncle were outside around a campfire approximately fifteen to twenty feet away at the time of the attack. (T. 56).

On direct examination Defendant admitted that he was deer hunting with Michael of October 23, 1976, but denied that he attacked Michael on that date or any other time. (T. 159, 160).

With regard to Count II, Petrita Garcia, a step-daughter of the defendant, testified that she was raped by the Defendant approximately twenty to fifty times, and in particular, on September 11, 1975, while she was twelve years old. The attack allegedly took place in the family mobile home at Wellington, Utah while the mother was in the hospital. (T. 6,7). Petrita further testified that she never told anyone that she had been raped. (T. 14).

With respect to Count III, Rosie Garcia testified that she was a step-daughter of the defendant and that he raped her in their mobile home at Wellington, Utah on March 15, 1977, while she was then twelve years old and while her mother was away at church. (T. 20, 21). She also testified that she had had intercourse with the Defendant on forty to fifty occasions. (T. 23, 25).

On direct examination the Defendant denied any acts of abuse or intercourse with either Petrita or Rosie. (T. 164).

POINTS ON APPEAL

POINT I

THE EVIDENCE WAS NOT SUFFICIENT TO SUPPORT THE VERDICTS.

The Defendant contends that the conviction of the Defendant of Forcible Sodomy and two counts of Rape is not supported by the evidence.

A. The conviction for Forcible Sodomy. The testimony of the alleged victim, Michael Gene Garcia, was incredible, suspicious, and inherently contradictory. The victim would have the jury believe that the Defendant committed ant of Sodomy upon him while deer hunting on October 23, 1976. (T. 51) This supposedly occurred in the presence of a cousin of Michael who was sleeping at his feet. (T. 68). The victim even contends that he was being attacked while he was kicking the cousin to awaken him. (T. 68).

Michael also testified that there were at least four to six other adults around a campfire fifteen to twenty feet away. (T. 59, 67). It would indeed seem incredible that the victim of a reprehensible attack would remain mute when assistance was so readily available.

The testimony of Michael was also inconsistent and contradicted

a previous statement made to a juvenile probation officer, Brian Matsuda. Mr. Matsuda, called as awitness by the plaintiff, testified on cross-examination that Michael Garcia had told him on June 24, 1977, that the Defendant had attacked Michael while deer hunting by forcing Michael to place his mouth upon the sexual organ of the Defendant. (T. 97). Mr. Matsuda also testified that there was no misunderstanding as to how Michael related the facts of the alleged Sodomy. (T. 100, 101). Yet Michael testified on direct examination that the Sodomy consisted of the Defendant placing his mouth upon the sexual organ of Michael. (T. 51, 66)

So gross an inconsistency as to who performed the act upon whom certainly raises suspicion as to whether the attack ever occurred and further renders the events testified to by Michael Garcia incredible. The very nature of this type of an attack suggests that it is an act not performed in the near presence of persons who might discover the activity. One further wonders why, if the attack occurred, no effective resistance was offered. The victim testified that he dared not yell for help (T.67) but yet he dared to kick his cousin for help. (T.68).

It is clear from the record that Michael harbored considerable animosity toward the Defendant and it is not beyond belief that Michael would falsely accuse the Defendant of a detestable offense. Michael told Mr. James Still, prior to trial, that "I'm setting up my stepfather." (T. 144). Michael also told Mr. Toby Vigil that he would have his relatives take care of the Defendant if the Defendant were sent to prison. (T. 149). It also appears that Michael was selling personal property belonging to the Defendant during the time the Defendant was incarcerated pending trial. (T. 133). Michael himself tesitified that he had held a .22 rifle on his stepfather (T. 60,61), that they had numerous

arguments (T. 60), that they had fist fights (T. 60), and that they had a conflict over a girl friend of Michael sleeping at Defendant's home. (T.73).

In view of the conflict existing between the Defendant and Michael the testimony of Michael becomes more suspicious in view of the significant inconsistent statement previously referred to.

B. The Conviction for Rape. The testimony of Rosie and Petrita Garcia to the effect that they had been raped by the Defendant was incredible and suspicious. At the time the attack on Petrita allegedly took place on Sept. 11, 1975, the victim was at home with her two sisters who were watching TV. (T. 9, 11). Even though one of the sisters knew the attack was taking place she did not attempt to go for help to anyone else in the trailer court. (T. 13). Petrita also testified that similar attacks had previously occurred on twenty to fifty occasions. (T. 7) Yet none of the attacks were reported to anyone, not even the mother. (T. 14)

Rosie Garcia testified that she had been raped by the Defendant on March 15, 1977 in their mobile hime while the mother was away at church. (T. 21). She further testified that the Defendant had raped her on 40-50 other occasions (T. 25) but that she told no one except a friend named Darla. (T. 30). She further testified that many of the other attacks took place in the presence of a sister (T. 25)and while the mother was at home. (T. 24). Yet the mother, Mrs. Rosie Gotfrey, testified that she never suspected or had reason to suspect that any type of an illicit on-going relationship existed between the Defendant and Rosie and Petrita. (T. 40).

It strains the imagination to believe that the Defendant could have raped each girl up to fifty times, many while the mother was at home, and

in the presence of another sister, without arousing the suspicion of the mother. One questions whether the attacks actually occurred if they were not reported to the mother until June of 1977. (T. 40). In particular, the remoteness of the supposed attack on Sept. 11, 1975, from the date it was reported seriously detracts from the credibility of the story presented by Petrita.

It is also significant to note that the attack upon Petrita on September 11, 1975, was not corroborated by Rosie Garcia who was at home at the time and supposedly had knowledge of the attack. (T.12).

By way of summary, the stories of the three victims are incredible and suspicious. Defendant submits that because of the inherent improbability of the stories the verdicts were not supported by the evidence. The conviction should "be scrutinized with great care because it is a charge easy to make and hard to defend against" , a principle with which this Court is in accord. State v. Ward, 10 Utah 2d 34, 347 P.2d 865 at 868, (Utah 1959).

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CLAIM OF A PSYCHOLOGIST-PATIENT PRIVILEGE.

Bobby Joe Fredrickson was called as a witness by the Plaintiff. (T. He testified that he was a clinical psychologist at Four Corners Mental Health in Price and in that capacity had a therapy contact with the Defendant on July 1, 1977. (T. 110, 111, 117) Over Defendant's objection the Trial Court permitted Mr. Fredrickson to testify that the Defendant had told him that the Defendant had had sexual intercourse with his two daughters. (T.

Defendant contends this testimony by Mr. Fredrickson was extremely

prejudicial and that the psychologist-patient privilege is applicable in this situation. Accordingly, the Trial Court should have sustained the objection to the testimony of Mr. Fredrickson. (T. 111).

The statutory privilege claimed by Defendant is set forth in Section 58-25-8 Utah Code Annotated 1953, as amended:

> A psychologist licensed under the provisions of this act cannot, without the consent of his client or patient, be examined in a civil or criminal action as to any information acquired in the course of his professional services in behalf of the client . . .

Although Mr. Fredrickson did not obtain a license pursuant to the procedure set forth in the Act at Section 58-25-2 (T. 110, 111), he was a clinical psychologist employed by a governmental agency, Four Corners Mental Health. The Act, however, exempts a psychologist from the licensing requirements if he is employed as a psychologist by a governmental agency:

> . . . . No person may represent himself to be a psychologist . . . unless he is licensed under the provisions of this act or exempted under the provisions of 58-25-6.
>
> Sec. 58-25-5, Utah Code Annotated

And Section 58-25-6, Utah Code Annotated 1953, as amended, provides:

> Nothing in this Act shall be construed to limit the activities, and use of official titles on the part of a person in the employ of a federal, state, county, or municipal agency, or other political subdivision, . . . , in so far that such activities and services are a part of the duties in his salaried position, and in so far that such activities or services are performed solely on behalf of his employer.

It is apparent that Mr. Fredrickson clearly falls within the exception of Section 58- 25-6 since he is an employee of Four Corners Mental Health and that he therefore is exempted from the licensing requirements of the act. Inasmuch as the exempted psychologist is allowed to engage in substantially the same duties and activities as the licensed psychologist, there appears no logical reason why the privilege should not apply in the event a patient sees a psychologist employed by a governmental agency as

opposed to one in private practice. In this particular instance the Defendant was engaging in therapy much the same as if he had consulted a psychologist in private practice. A person willing to enter in to ther ought to be able to do so, feeling that his conversations will be held confidential. It would seem that this is especially true where a governmental agency holds itself out as being a mental health center and there clothes itself with the appearance of being a quasi-medical body. The very concept of a mental health clinic implies that there be honest and accurate communication between psychologist and patient. If the privile is not extended to those psychologists working for a governmental agency the free flow of communication theory will be thwarted and the concept of honesty between psychologist and patient suffers a chilling effect. Note that even Mr. Fredrickson was under the impression that the therapy sessi was confidential. (T. 114).

It would also seem proper to uphold the privilege of psychologist patient in this instance on an agency theory,i.e.,that if a certified or licensed psychologist referred the patient to another psychologist in the Four Corners Mental Health Center the credentials of the referror ought t flow to the psycholgist to whom the patient was referred. To not so hold wou place upon the patient the burden of determining the qualifications of ea person with whom he engages in therapy contact. This principle is import in the case at bar for the reason that Mr. Fredrickson testified that the Defendant was referred by Mr. Fredrickson's supervisor. (T. 121) and th four or five other psychologists had been working with the Defendant. (T. This in itself would place an impermissible burden on the Defendant to determine what things he would be able to discuss with which psychologis without the fear of having his confidences revealed. Since the Defendan

appears to have had contact with at least two licensed psychologists at the Four Corners Mental Health Center (T. 113, 114), it would seem only in fair play to allow the defendant to expect that his confidences with each therapist would receive equal dignity and protection under the law.

POINT III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO STRIKE COUNT I FROM THE COMPLAINT AND IN DENYING DEFENDANT'S MOTION TO QUASH.

At the time of Arraignment on December 21, 1977, Defendant moved to quash the Information upon the grounds that it charged more than one offense in violation of Section 77-23-3 (1) (g). It should be noted here that the Information charged one Count of Forcible Sodomy, two counts of Rape, and two Counts of Forcible Sexual Abuse. The Motion was denied and overruled. (Minute entry of Dec. 21, 1977, located at Minute Book No. 16, page 32. Excerpt therefrom attached to Court file). At the commencement of trial on March 20, 1978, Defendant moved to Strike Count I, Forcible Sodomy, from the Information for the reason that it would unduly prejudice the defendant and deprive him of a fair trial to try a sodomy case concurrently with two counts of Rape. The motion was denied and overruled.

Section 77-23-3, Utah Code Annotated 1953, as amended, provides:

> A Motion to Quash the Information or Indictment shall be available only on one or more of the following grounds. In the case of:
> (1) Either an information of indictment:
> (g) That there is more than one offense charged except as provided in section 77-21-31 of this Code.

There can be no dispute that more than one offense was charged in the information. The issue is whether the multiple charges are permissible under Section 77-21-31. Said Section provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of similar character or are based on two or more acts or transactions or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Defendant contends that Forcible Sodomy is an offense not similar in character and not based on the same act or transaction as the two Rape charges contained in the information. Nor was the Sodomy count connected together with the Rape offenses or Sexual Abuse offenses as part of a common scheme or plan. Accordingly, the Motion to Quash should have been sustained.

It is clear that rape and sodomy are separate and distinct offenses each having its own elements. One is not included within the other. The legislature saw fit to distinguish the offense of rape from sodomy by giving each offense its own definition, established different elements, prescribed different penalties, and gave each offense its own section number. Not to be overlooked is the gross perversion usually ascribed to sodomy as distinguished from the offense of rape. The greatest dissimilarity between the two offenses would be that the offense of rape can only be committed by a male person upon a female while the offense of sodomy could be committed by either male or female upon another person regardless of gender.

In the instant case the information itself shows that the Count I offense of Forcible Sodomy, alleged to have occurred on October 23, 1976, was remote in time and place from the two counts of rape alleged to have occurred on September 11, 1975, and March 15, 1977. The infomation charges that three different victims were involved and that they all occurred at considerably different times and places. This remoteness would seem to

negate the assertion in this case of the rapes and sodomy being connected together or constituting parts of a common scheme or plan. Defendant submits that there is no evidence in the record to show that any forethought or planning was involved in the alleged commission of any of the offenses. Further, the record is devoid of any evidence of a scheme or plan which would tend to link the offenses together.

The effect of the misjoinder is to prejudice the defendant in the eyes of the jury when he is tried in the same action for offenses which bear no reasonable relationship to each other. The jury could not help but be unduly influenced against the defendant during the testimony of Rosie Garcia and Petrita Garcia, having previously heard the information read to them alleging a count of sodomy..

In State v. Sanchez, 511 P.2d 1231 (Or. 1973), an Oregon statute permitted charging several crimes in a single indictment when they arose from "the same act or transaction." The Oregon Supreme Court held that in view of a previous case, State v. Brown, 497 P.2d 1191 (Or. 1972), two or more crimes are part of a single transaction when they are closely linked in time, place and circumstances. The Court stated in Sanchez:

> But even assuming the murder and robberies are one transaction, we perceive no basis for including the crime of theft in that transaction. That crime was committed hours after- the murder and blocks away. There is no overlap between the evidence of the murder and robberies on the one hand, and the theft on the other hand. Accordingly, we conclude that at least the theft charge was improperly joined with the other counts. 511 P. 2d at 1234.

Applying the principle of Sanchez to the instant case it is clear that there is no overlap of evidence between the sodomy charge and the two counts of rape. None of the testimony of Michael Garcia regarding the offense of sodomy had any relationship to the rape offenses.

The Oregon Court found two different transactions when they were commi[illegible] blocks away from each other and hours apart. In the case at bar the of[illegible] were months and even more than a year apart and committed miles from ea[illegible] other.

Consider also State v. Weitzel, 69 P.2d 958 (Or. 1937), wherein t[illegible] Oregon Supreme Court stated:

> Appellants complain of the admission in evidence of the facts and circumstances surrounding the attempted rape. It is asse[illegible] that such evidence hs no relevancy to the charge of sodomy. I[illegible] law is well settled that, when several criminal acts are so connected with the defendant, with respect to time and locali[illegible] that they form an inseparable transaction, and a complete acc[illegible] of the offense charged in the indictment cannot be given with[illegible] detailing the particulars of such other acts, evidence of the entire transaction is admissible, even though it may disclose the commission of another crime. . . 69 P. 2d at 963.

The danger hinted at in Weitzel is that separate charges which are are not connected in time and locality may well have no substantial relevancy to each other . One would therefore not be admissible against the [illegible] since that would violate the general rule that evidence of other crimes is not admissible. Since the crimes of sodomy and rape are not similar and in light of the fact that they bore no reasonable relation to each other in time or place the Court should have sustained the Motion to Quash, and failing that, granted Defendant's Motion to Strike Count I and order that it be tried in a separate action.

CONCLUSION

The verdicts and judgments pronounced upon the Defendant should be reversed and the cause remanded back to the Trial Court for a new trial for the reasons set forth in the preceding Points I, II and III.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, BRYCE K. BRYNER, hereby certify I personally served three (3) copies of the above and foregoing BRIEF OF APPELLANT upon Robert B. Hansen, Attorney General of the State of Utah, by personally delivering said three copies to the Office of the Attorney General at 236 State Capitol, Salt Lake City, Utah, this 28th day of August, 1978.

Bryce K. Bryner

Bryce K. Bryner